

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 32**

ASSOCIATED TAGLINE, INC.

Employer-Petitioner

32-UC-367

**GENERAL TEAMSTERS, WAREHOUSEMEN
AND HELPERS, LOCAL 890, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO**

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, careful investigation and consideration has been given to this matter.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based upon the administrative investigation, the facts of which are not in dispute, I find as follows:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The labor organization involved claims to represent certain employees of the Employer.
3. By its petition, the Employer-Petitioner seeks clarification of the bargaining unit described below in the Certification of Representative dated April 19, 1999.²

All full-time and regular part-time production, maintenance, distribution and application employees employed by the Employer at its Salinas, California facility; excluding all office clerical employees,

¹ Hereinafter the Board

² All dates hereinafter are 1999 unless otherwise noted.

professional employees, guards and supervisors as defined in the Act.

4. The Employer-Petitioner seeks clarification as to whether the application employees are included in the unit or excluded from the unit as agricultural employees in view of the Union's Petition for Certification filed on April 1 with the State of California Agricultural Labor Relations Board (ALRB), seeking to represent the Employer's application employees. Employer-Petitioner's position is that if the Board has jurisdiction over the application employees, then they cannot be considered agricultural employees.
5. The Union's position is that the Board has jurisdiction over the application employees while they are performing non-agricultural work, and that the ALRB has jurisdiction over these employees while they are performing agricultural work.

The Employer's Operations

The Employer is a commercial fertilizer company with its plant located in Salinas, California. It manufactures and distributes fertilizer and other soil amendments, which is bagged and then used for both commercial and residential use. Additionally, the Employer provides fertilizer and pesticide application services to various growers in Monterey County. The Employer does not grow, harvest, pack, transport or sell any agricultural products, nor does it finance any land used to grow crops, or have any financial interest in same. The Employer employs approximately 62 employees, most of whom perform plant production work, operate forklifts, make deliveries, and do plant maintenance work. The Employer also employs thirteen tractor-drivers and three spreader drivers, collectively called the application employees, who are the subject of the instant petition.

The Application Employees' Job Functions

The bulk of the Employer's application services are performed during the peak, or dry season, which usually runs from March or April until November. During the off season, substantially less application service is performed due to the rain. Although application employees work full time throughout the year, they put in considerably more time during the peak season. During the peak season, the application employees usually report to the Employer's facility at the beginning of the day, clock in, and inspect their trucks. These are big ten axle trucks which tow the farm tractors or loaders which are used in the fields. After tractor drivers receive their first assignment, they line up to load their trucks with dry or liquid fertilizers or pesticides. Next they drive to wherever the customers' fields are located, with distances ranging up to 70 miles from the plant. Once they arrive at the customer's fields, they consult with the person in charge, and then unload the tractors, which are towed behind their trucks. Shoes, which are

implements attached to the tractor, are set for the type of work to be performed, and then the tractors are loaded with the material carried in the truck. The tractor driver then applies soil amendments to the fields where crops are growing and/or shapes the rows in which plants are growing. A tractor driver may have as many as 5 assignments in a day.

In contrast to the tractor drivers, the spreader drivers perform work on fields where no plants are growing above the ground, and they do not engage in row shaping or the application of pesticides. Instead of tractors, they tow loaders behind their trucks, and use the loaders to load their trucks with materials such as lime, gypsum or compost, which has been manufactured and delivered to the fields by other companies. The spreader loaders use their trucks to spread these materials on the fields.

During the off-peak season, both tractor and spreader truck drivers engage in the same job duties, and spend considerably less time in the field applying materials. During the off-peak season they perform equipment maintenance and repair, fill boxes with fertilizer, label, stack, clean, and make deliveries. During peak season, application employees spend approximately 60% to 70% of their time in the field, but reducing this for the time spent on duties such as loading, unloading, and cleaning equipment, consultation, and shoe setting, it appears that they spend approximately 50% of their time applying materials to the soil or building rows. On an annual basis, factoring in the off-peak season, approximately 32% of the application employees' time is spent in applying materials and shaping rows.

Analysis

Section 2(3) of the Act excludes from the definition of "employee", "any individual employed as an agricultural laborer." Since 1947, Congress has added an annual rider to the Board's appropriation measure directing the Board to apply the definition of "agriculture" found in Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 203(f), in construing the term "agricultural laborer." Section 3(f) of the FLSA provides:

"Agriculture" includes farming in all its branches...and any practices...performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The evidence establishes that the application employees are dual function employees; they perform activities that constitute both agricultural and non-agricultural labor. When they are applying materials to the soil and forming rows, they are engaged in farming operations that fall under the primary meaning of agriculture for purposes of interpreting Section 3(f) of the FLSA as explained by the Supreme Court in Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762-763 (1949). When

application employees are performing their other job functions, such as loading, driving, maintaining equipment, they are engaged in non-agricultural work. Since this work is substantial, they are employees covered by the Act when performing those duties. See Produce Magic, Inc., 311 NLRB 1277 (1993). While I note the Employer-Petitioner's contention that asserting joint or concurrent NLRB and ALRB jurisdiction over the same employees will breed needless confusion and uncertainty in the workplace, I find that the Board's decision in Olaa Sugar Co. 118 NLRB 1442 (1957), cited in Produce Magic, supra, is dispositive. The Board set forth the following rule regarding jurisdiction over employees who perform both agricultural and nonagricultural work:

We now announce the rule that employees who perform any regular amount of non-agricultural work are covered by the Act with respect to that portion of the work which is non-agricultural.

Conversely, the Act does not cover employees when they are engaged in agricultural work. In view of the evidence that application employees spend about one third of their time engaged in primary agricultural work, I am clarifying the unit to exclude application employees only when they are engaged in the application of materials to the soil and building and shaping of rows. See Produce Magic, supra at pg. 1279.

ORDER

IT IS HEREBY ORDERED that the collective bargaining unit certified in Case 32-RC-4588 be, and it hereby is, clarified to exclude application employees only when they are engaged in the application of fertilizer and materials to the soil, and when they are engaged in the building and shaping of rows on farms.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by December 16, 1999.

Dated at Oakland, California this 3rd day of December, 1999.

/s/ James S. Scott

James S. Scott, Regional Director
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